

Calhoun  
148455



Comptroller General  
of the United States  
Washington, D.C. 20548

## Decision

**Matter of:** Lori Hawthorne  
**File:** B-250912  
**Date:** January 25, 1993

Lori Hawthorne for the protester,  
Allen W. Smith, Department of Agriculture, Forest Service,  
for the agency.  
Tania L. Calhoun, Esq., and Christine S. Melody, Esq.,  
Office of the General Counsel, GAO, participated in the  
preparation of the decision.

### DIGEST

Protest challenging termination of protester's contract for archeological documentation services due to protester's involvement in preliminary work on the project is sustained where record shows that protester's activities related to the project were so minimal that they could not reasonably be construed as giving rise to a conflict of interest.

### DECISION

Lori Hawthorne protests the termination for convenience of a contract awarded to her under request for quotations (RFQ) No. R3-15-8-92, issued by the United States Department of Agriculture (USDA), Forest Service, for cultural resource historic documentation of various sites within the Cloudcroft Ranger District, Lincoln National Forest, New Mexico. The protester argues that the termination of her contract was improper.

**We sustain the protest.**

The RFQ was issued on August 18, 1992, as a total small business/small purchase set-aside for the acquisition of cultural historic research services consisting of the documentation of 7 historic sites and 19 culverts constructed by the Civilian Conservation Corps. The work was designed to recover as much historical documentation as possible in order to mitigate the effects of a proposed road reconstruction project on the historic sites, and to record information about the culverts that may be lost during the road reconstruction project. The RFQ stated that the objectives of the study were to locate, research and report on historical data at each site; make recommendations about future management of the sites; and photograph and accurately

record the culverts. The RFQ instructed that a purchase order resulting from it would be issued to the responsible quoter whose offer, conforming to the RFQ, would be most advantageous to the government, price and other factors considered. While six people or firms received copies of the RFQ, Hawthorne submitted the only quote. On September 22, Hawthorne was awarded the contract in the amount of \$5,000.

After the award, the contracting officer retired. On September 28, a new acting contracting officer reviewed the contracts for which she would be responsible; Hawthorne's contract was among these. The acting contracting officer determined that the award to Hawthorne created the appearance of a conflict of interest. This determination was based on Hawthorne's status as a former Forest Service employee who, the agency asserts, was involved in the design of the project which later became the basis for this RFQ. Since the agency determined that the award created the appearance of a conflict of interest, Hawthorne's contract was terminated for convenience on September 30; this protest followed.<sup>1</sup>

An agency decision to terminate a contract for the convenience of the government is not reviewable by our Office, except where, as here, the agency determines that the initial award was improper and the contract should be terminated for that reason. Childers Serv. Center, B-246210.3, June 17, 1992, 92-1 CPD ¶ 524; Huynh Serv. Co., B-242297.2, June 12, 1991, 91-1 CPD ¶ 562.

An agency may take action to exclude a firm from the competition where the record contains evidence that there was a likelihood that an actual impropriety or conflict of interest existed, as well as some basis for determining that the impropriety or conflict warrants the exclusion of that firm. See NKF Eng'g, Inc., 65 Comp. Gen. 104 (1985), 85-2 CPD ¶ 638; NES Gov't Servs., Inc.; Urgent Care Inc., B-242358.4; B-242358.6, Oct. 4, 1991, 91-2 CPD ¶ 291. The determination that a conflict of interest is likely to have existed must be based on facts, rather than mere innuendo and suspicion. See Laser Power Technologies, Inc., B-233369, B-233369.2, Mar. 13, 1989, 89-1 CPD ¶ 267.

---

<sup>1</sup>After the termination of Hawthorne's contract, the acting contracting officer contacted SWCA, Inc., one of the firms that failed to respond to the RFQ, and asked if it would now submit a quote. On September 30, SWCA submitted a quote in the amount of \$5,945; award was made to SWCA on October 5. Performance has been stayed pending the resolution of this protest.

Although the agency here does not cite specific authority for its decision that Hawthorne is ineligible for award based on the alleged conflict of interest, it appears that the agency believes that Hawthorne is ineligible because of the degree of her involvement in the preliminary work on the project to which the work called for under the RFQ is related. See Federal Acquisition Regulation § 9.505-2(b) (a contractor is generally prohibited from providing services if the contractor prepares, or assists in preparing, a work statement to be used in competitively acquiring the services, or provides material leading directly, predictably, and without delay to such a work statement). Specifically, the agency argues that during Hawthorne's term of employment<sup>2</sup> she was directly involved in the survey and design of the project prior to issuance of the RFQ; according to the agency, this involvement created the appearance of a conflict of interest in connection with award of the current contract. The acting contracting officer asserts that Hawthorne's prior involvement in the project is evidenced by the fact that she was on the team that developed the Survey and Design Report on which the RFQ is based; her name is specifically listed in this report.

Hawthorne states that her involvement in the project was minimal and was limited to preliminary activity not directly related to the work subsequently called for under the RFQ. She explains that, in July 1992, she did accompany the Assistant Forest Archeologist to a site where the historic sites included in the contract were located, and that they conducted documentation for approximately 4 hours. Her participation was part of her work as a volunteer available to assist the Forest Service in various projects. She reports that, at the time, she knew of no plans to award a contract to do further work at the site, and asserts that her efforts were unrelated to the work subsequently called for under the RFQ. The archeologist, who wrote the RFQ in question, concurs, and adds that the site Hawthorne helped document was a prehistoric site--not one of the historic sites covered in the RFQ.

In explanation of the presence of her name in the Survey and Design Report on which the RFQ is based, Hawthorne states that it is the policy of the Lincoln National Forest

---

<sup>2</sup>The record shows that Hawthorne was a temporary employee with the agency through April 5, 1991. She continued her work on a volunteer basis through August 21, 1992. The acting contracting officer asserts that Hawthorne's most recent volunteer work occurred on September 30; Hawthorne disputes this assertion.

archeologists to list, in the project report, every person who in any way helped with a project. Since, as discussed above, she assisted in the preliminary documentation aspect of this project, her name was listed in the resulting project report; because this project report was used in the preparation of the RFQ, her name was also entered into the Survey and Design Report for the contract. Further, Hawthorne explains that the RFQ included a history of the Sacramento Mountains, where the project area is located. She states that she had written this history for another project in 1991 when she was still employed by the Lincoln National Forest; because it was a readily available history of the area, it was included in the RFQ. Hawthorne has submitted a statement from the archeologist who wrote the research design and prepared the cost estimate for the RFQ concurring with Hawthorne's account of her involvement.

We find that the record does not support the agency's finding of an apparent, much less an actual, conflict of interest. While the agency is correct in its assertion that Hawthorne was involved in the preliminary work on the project prior to issuance of the RFQ, the agency has provided no information to support its contention that this involvement created an apparent conflict of interest. In contrast, Hawthorne has provided a detailed explanation of her participation in the project, along with corroborating statements of two agency archeologists who were directly responsible for the project and resultant RFQ. These materials indicate that her activities related to the project were so minimal that they could not reasonably be construed as giving rise to a conflict of interest. Accordingly, we find that the termination for convenience of Hawthorne's contract on the basis of the alleged conflict of interest was not warranted.<sup>3</sup>


We recommend that the Forest Service terminate the contract it awarded to SWCA and reinstate the protester's contract. Since we sustain the protest, we find Hawthorne entitled to

---

<sup>3</sup>In their protest filings, both parties discussed an internal USDA regulation regarding contract awards to former employees. That regulation, USDA Departmental Regulation 5000-6, April 8, 1983, has no direct bearing on the basic propriety of the award to Hawthorne; rather, it simply sets out the agency's internal requirements for approval by upper-level agency officials in situations where the agency's procurement officials propose to make award to a former agency employee.

her costs of filing and pursuing this protest. See NES Gov't Servs., Inc.; Urgent Care, Inc., supra; 4 C.F.R. § 21.6(d)(1) (1992). Hawthorne should submit her claim for costs directly to the agency.

The protest is sustained.

*for*   
Comptroller General  
of the United States